Capital Juries and Objective Mitigation:

Is Disagreement with Factually Asserted Mitigating Evidence Related to Ultimate Sentence Recommendation?

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Abstract

Capital Juries and Objective Mitigation: Is Disagreement with Factually Asserted Mitigating Evidence Related to Ultimate Sentence Recommendation?
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Determining precisely what type of mitigating evidence will spare a capital defendant from the death penalty is the hallmark of capital litigation defense. That understanding has driven decades of research since the reemergence of the American death penalty in 1976, and it guides the actions of mitigation specialists. Despite the procedural rule that juries must consider mitigating evidence presented and then decide whether to assign it any weight, anecdotal evidence suggests that this may not be uniformly practiced. Rather, it is reportedly not uncommon for juries to disagree with mitigating factors that are essentially settled fact. The proposed study sought to empirically explore (1) how common or uncommon that practice is; (2) whether that practice is related to the ultimate sentence recommendation of life or death; and (3) whether the effect on sentence recommendation increases linearly with the increasing number of disagreed-to facts. Results indicated that (1) the practice may be more common than hypothesized; (2) when observed, disagreement with mitigators such as lack of significant criminal history or youth are significantly related to sentence recommendation; and (3) the effect may compound when multiple mitigators are considered together.

Introduction

Since the revival of the death penalty in the United States in 1976, the procedures employed by the 37 death penalty jurisdictions have become largely uniform. A capital defendant's guilt will be examined by a death-qualified jury and, if he or she is found guilty, that jury will then balance mitigating against aggravating evidence before recommending a sentence of death or life (i.e., long-term imprisonment). This procedure resulted from several key United States Supreme Court cases over the past 30+ years.

Both legal scholars and social scientists have found the constant evolution of capital jurisprudence a fertile ground for discussion and research. Although legal scholars may generally limit their investigation to the descriptive or proscriptive arenas, social scientists have conducted empirical research examining trends and patterns in capital sentencing. The majority of these studies examine either broad trends (e.g., death qualified juries, the interaction of race and sentencing) or particularly effective evidence (e.g., specific mitigating factors typically well-received by juries.)

Whereas many worthwhile analyses are self-evident to scholars and academics examining capital sentencing from afar, others arise out of observations made by practitioners working within the capital justice system. One such observation subjected to empirical analysis in this project deals with capital jury treatment of factual mitigating evidence. Stated another way, while most evidence presented to juries in capital cases could arguably be subjective or debatable, other evidence is presented by capital defense as settled fact. Despite the nature of that evidence, practitioners have reported that it is not uncommon for capital juries to ignore it, as indicated by their disagreement with the statutory mitigating factors corresponding to that evidence. Of greatest practical interest

is whether disagreement with mitigators of that asserted factual nature is related to sentence recommendation, which is the question empirically examined in this project.

Background and Literature Summary

The Modern Death Penalty Era in America

In 1976, the United States Supreme Court lifted the moratorium on capital punishment it had imposed 4 years earlier in Furman v. Georgia (1972). With this ruling in Gregg v. Georgia (1976), the Court identified in Georgia, Florida, and Texas a new framework for imposition of the death penalty that comports with the United States Constitution. Still in effect today, the two broad requirements for state and federal capital penalty statutes to be constitutional are that: (1) objective criteria must be provided to both direct and limit sentencing discretion; and (2) the criteria must allow for a particularized consideration of the character and record of the convicted by the sentencer (Gregg v. Georgia, 1976). These broad requirements are satisfied by what is now standard capital case procedure, hallmarked by a bifurcated trial. In this two-part proceeding, the first phase focuses on the guilt of the accused, and the second (only following a finding of guilt) examines whether the capital defendant should be given the death penalty.

The capital trial sentencing phase consists of defense and prosecution presenting evidence to the jury to encourage a recommendation of either imprisonment or death. The prosecution presents aggravating evidence in favor of the death penalty and, at the conclusion of its evidence (per Gregg v. Georgia, 1976), it must present to the jury at least one statutorily defined aggravating factor (see, e.g., Appendix A: North Carolina Statutorily Enumerated Aggravating Factors). In counterbalance to the prosecution's

aggravating evidence, the defense presents to the jury mitigating factors (see, e.g., Appendix B: North Carolina Statutorily Enumerated Mitigating Factors.) Mitigating evidence is, as the name suggests, evidence that perhaps reduces the moral culpability of the defendant; not to excuse the defendant from guilt, but to reduce his or her subjective culpability and spare the defendant from the penalty reserved for the "worst of the worst" (Kansas v. Marsh, 2006, p. 206). After all, as Justice Stewart simply put it, "Death is *different*…" (Gregg v. Georgia, 1976, p. 188, emphasis added).

The intricacies of mitigation.

Since Gregg v. Georgia (1976), the Supreme Court has further clarified the intricate rules surrounding capital sentencing, mitigating evidence, and aggravating evidence. For the most part, the Court has held that aggravating evidence must be limited lest the death penalty be inappropriately applied. This includes, for example, the requirement that aggravating factors qualifying a defendant for the death penalty be statutorily defined (Gregg, but see Zant v. Stephens, 1983). At the same time, however, these factors can exist either for ex-ante consideration in the definition of the offense itself, or for ex-post consideration during the sentencing phase (Lowenfield v. Phelps, 1988).

In contrast to decisions limiting aggravating evidence, a separate string of decisions has increased the potential scope of mitigation and flexibility with which defense may pursue and present mitigating evidence. The most fundamental of these cases came only 2 years after Gregg v. Georgia (1976), with the Supreme Court ruling in Lockett v. Ohio (1978) that an Ohio statute barring the introduction of certain mitigating evidence was unconstitutional. Expanding on that conclusion, and perhaps put best by

Justice Burger: "[T]he Eighth and Fourteenth Amendments require that the sentencer…not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (Lockett v. Ohio, 1978, p. 604). Thus, Lockett (1978) stands today for the principle that the scope of mitigation is extremely broad.

Despite Justice Burger's characterization that nearly anything is allowable in mitigation, the Supreme Court has occasionally had to make specific rulings which, almost unanimously, identify specific allowable evidence. Over time, this list would come to include non-statutorily defined mitigating evidence (Lockett v. Ohio, 1978; Hitchcock v. Dugger, 1987), testimony regarding the defendant's pre-adjudication incarcerated behavior (Skipper v. South Carolina, 1986), or even sheer sympathy felt for the defendant (Saffle v. Parks, 1990). Really the only limit seems to be judicial patience in cases of cavalier defense counsel, though judges likely shy away from questionable rulings that could be grounds for appeal.

Despite the Supreme Court's ruling in Lockett (1978), some confusion still existed among the states when it came to the expansiveness of mitigation. In 1982, the United States Supreme Court reviewed a case from Oklahoma in which a holdout juror declined to agree with any of the mitigating evidence. Therein, the jury had thus thought itself unable to assign any of the mitigating evidence weight in its sentencing decision. In overturning the death sentence, the Court explained that "failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, [and] it is our duty to remand this case for resentencing" (Eddings v. Oklahoma,

1982, p. 117). The Eddings (1982) decision was further clarified by the Supreme Court's later explanation that misapplication of this rule by the jury, be it due to the their misinterpretation of the court's instructions (Mills v. Maryland, 1988) or misleading of the jury by the court (McKoy v. North Carolina, 1990), will result in the case being remanded for resentencing. Thus the combined effect of Lockett (1978), Eddings (1982), and their progeny was that all mitigation may be submitted to the jury, and the jury may holistically assign any of the evidence weight regardless of its level of agreement with it.

The interaction of mitigation, aggravation, and sentence.

In 2002, the United States Supreme Court concluded in Ring v. Arizona that, for a sentence of death, the jury must find the presence of at least one aggravating factors and also that the presence of any mitigating factors does not outweigh the aggravating evidence. At the same time, though, Florida's statutory framework has continued to survive constitutional challenge –allowing a judge to impose a sentence of death following a jury's finding of sufficient aggravating evidence, albeit recommending life (Spaziano v. Florida, 1984; West's F.S.A. § 921.141, 2010). Additionally, it is also constitutionally permissible for a state statute to mandate a sentence of death upon a finding of at least one aggravating factor and the absence of any mitigating factors (Blystone v. Pennsylvania, 1990). Thus it is arguably important for capital defense to ensure damage control of aggravating evidence (per Spaziano), and to ensure that the jury will agree with at least one of the mitigating factors presented to it (per Blystone).

Procedural considerations.

Aggravating and mitigating evidence, narrowly tailored on the one hand and fairly open-ended on the other, may be presented to the jury in the form of eyewitness accounts,

character evidence or witnesses, expert analysis, victim impact evidence, and many other ways. At the conclusion of the presentation of aggravating and mitigating evidence during the sentencing phase, the judge instructs the jury on how it should make a recommendation of life or death. In North Carolina (which is the focus of the current study), following those instructions, the prosecution and defense must supply the jury with written lists of aggravating and mitigating factors, which the jury may then reference in deliberation. At the conclusion of its deliberation, and upon its recommendation of life or death, the jury returns those documents to the court reflecting its agreement or disagreement with the aggravating and mitigating evidence. (These forms are of particular relevance to this study and will be referenced later.)

Extant Literature on Mitigation and the Death Penalty

The still-growing body of United States Supreme Court cases dealing with the death penalty is matched by a comparably massive amount of literature and commentary on the subject published in the last several decades. This probably comes as no surprise due to the highly emotional nature of the subject, its noted correlation with traditional political lines, and the hard-line views that many Americans take on the subject. Although an exhaustive review of the literature is logistically prohibitive, some general themes and trends are worth noting. Importantly, this section will also explain how the current proposed study fits into that framework.

The literature on the death penalty in America can be placed into four categories. The first category is descriptive literature, which attempts to explain the rules in place for death penalty proceedings and how they all work together in a larger procedural context. The second category is experimental literature, mostly authored by American social

scientists, which examines patterns and trends in capital jurisprudence. The third category is archival research based on analysis of actual capital case data. The fourth category is proscriptive literature, which attempts to synthesize the descriptive and experimental literature to produce a range of recommendations for how capital penalty procedure in America should change. One could argue that a fifth and overlooked category is philosophical literature, which refers to books and articles that take a firm stance either in favor of or in opposition to the death penalty. Because much of that literature is grounded in political or deontological values, though, it exists outside the scope of this present examination.

Descriptive literature.

The descriptive literature is probably the largest of the four categories because individuals from both the social science and legal communities have been major contributors. The descriptive literature includes, for example, historical reviews and descriptions of the evolution of death penalty procedure in America (e.g., Banner, 2002). Many of these articles and books discuss the evolution of capital punishment in terms of an English/American tradition (Paternoster, 1991) or more broadly as a human phenomenon (Duntley & Shackleford, 2008). More pointed are simpler descriptive pieces that explain the rules and procedure pertaining to death penalty litigation (Mandery, 2005), which range from straightforward factual books (e.g., Streib, 2005) to more detailed analyses of specific aspects of death penalty practice (Wyda & Black, 1989).

Another type of descriptive literature might address the death penalty within a certain framework or through a particular lens. This might have to do with offender

characteristics, such as race (Allen & Clubb, 2008), gender (O'Shea, 1999), or age (Lewis et al., 1988). Others address the role of certain professional players like forensic psychiatrists (Leong, 1993), forensic mental health experts (Fabian, 2003), mitigation specialists or consultants (Dennis, 2000), or attorneys defending those accused of a capital offense (McPherson, 1995). Still other works take the more lay perspective of families of those accused of capital offenses (Sharp, 2005) or those working closely with the accused (Prejean, 1993), and some have even taken the perspective of the accused or convicted themselves (Robertson, 2002; Stetler et al., 2001).

Another variety of descriptive literature discusses the death penalty in light of a particular case or set of cases (Beszterczey, 2007; Romeo, 2006; Singh, 2006; Spain & Schmedlen, 2005). A final body of descriptive literature is more oriented toward those working in the field. For example, Goldstein et al. (2006) address the importance of childhood trauma in the lives of those defendants convicted of a capital offense and facing the death penalty. More recently, Kaser-Boyd (2008) explained how a revival of the Rorschach in a forensic context could be used to demonstrate impairment or deficits in those convicted of capital offenses.

Experimental literature.

Although somewhat less expansive than the descriptive literature, a great deal of experimental research has been devoted to capital sentencing, with a particular focus on mitigation. Several generalizations can be made about this experimental literature. First, the overwhelming majority of it is based on controlled studies conducted with mock jurors (e.g., Haney & Lynch, 1994; Butler, 2007); very little is based on archival research (c.f. Beck and Shumsky, 1997). Second, many of the studies deal with broad concepts

like death-qualification (Butler & Moran, 2007) or the interaction of race and sentencing (Brewer, 2004). Last, the studies that do look at specific mitigating factors are each necessarily limited to only a few specific factors (e.g., Barnett et al., 2004, 2007). The combined effect of these three limitations is a significant gap in the understanding of how mitigating factors act and interact to produce a particular sentence recommendation.

Social scientists have been examining patterns in death penalty decisions ever since the 1976 Supreme Court decision restoring the death penalty as a potential sentence in America (Gregg v. Georgia). One of the first major studies, by Luginbuhl and Middendorf (1988), found that jurors strongly opposed to the death penalty are significantly more receptive to mitigating factors than jurors unopposed to capital punishment. Ten years later, Stephen P. Garvey and the Capital Jury Project found that residual doubt of a defendant's guilt and the age of the defendant were significant mitigating factors, with some indications that evidence of psychological or psychosocial factors might also mitigate (Garvey, 1998). Several years later, another controlled experiment looking at the efficacy of different mitigating factors found that juries are less likely to recommend death in light of evidence of mental illness, intoxication at the time of the offense, or a history of abuse (Barnett et al., 2004). That same study also found that juries are more likely to recommend death in the complete absence of any mitigating evidence.

Death qualification is a hurdle that all capital jurors must clear, and something with which many social scientists take issue. In short, during jury selection, if the trial has the potential to become a capital case, the court must confirm that each juror is "death qualified," meaning that he or she is not categorically opposed to the death penalty, and

that he or she could cast a vote for the death sentence. Recently, Butler and Moran (2007) investigated *inter alia* the impact of death qualification on jurors' receptivity to aggravating and mitigating factors. Their analysis of 212 venirepersons indicated that death-qualified jurors are more likely to demonstrate higher endorsement of aggravating factors and lower endorsements of both non-statutory and statutory mitigating factors (Butler & Moran, 2007). In another study, death-qualified mock jurors were found more likely to render a guilty verdict than jurors who would have been excluded for inability to be death qualified (Butler, 2007). Despite these and similar findings, the Supreme Court has consistently held, beginning with Lockhart v. McCree (1986), that even in light of such evidence, it is still constitutionally permissible to require the use of death-qualified juries. As Lockhart (1986) has yet to be overturned, despite indications that the process of selecting a death-qualified jury may bias the jury in favor of the prosecution, the Supreme Court has upheld the process as constitutional.

Like death-qualified juries, jury instructions are another broad concept that have been the target of controlled research. For example, in a controlled study with 491 undergraduates, mock jurors were thrice instructed on how to reach a sentence in a capital case (i.e., aggravating evidence, mitigating evidence, discussion, and recommendation of death only if at least one statutorily defined aggravating factor is found and it is not outweighed by mitigating evidence). Despite having been instructed three times, the participants showed highly variable ability to even define aggravating and mitigating evidence, let alone in how they apply the rules in making a sentence recommendation (Haney & Lynch, 1994). These findings were supported by Wiener's (1998) mock jury study, which found that following jury instructions, participants

showed low accuracy for both of the Gregg v. Georgia (1976) requirements. Analyses also indicated a troublesome negative correlation between accuracy and recommendation of the death penalty (Wiener, 1998).

Other studies have focused more pointedly on mitigating evidence. For example, in a recent experiment, Barnett et al. (2007) used hypothetical scenarios presented to undergraduate mock jurors to gauge the impact of different mitigating evidence in capital sentencing. They found that evidence of mental retardation, history of hospitalization for mental illness, lack of criminal record, history of major head injuries, schizophrenia (specifically), and a history of childhood physical or sexual abuse had the most mitigating effect in capital sentencing (Barnett et al., 2007). Furthermore, despite their common appearance among statutorily enumerated *mitigating* factors, and some of the earlier findings by Barnett et al. (2004), they found that evidence of alcohol or drug dependence, or evidence that the defendant was intoxicated at the time of the offense, actually had an *aggravating* effect (Barnett et al., 2004, 2007).

Yet another controlled study examined the effectiveness of both type and quantity of mitigating factors presented to the jury. Tetterton and Brodsky (2007) found that an extended period of childhood abuse is associated with elevated juror compassion, inherently linked with mitigating value. They also found that the sheer volume of mitigating circumstances presented to the jury seemed to be positively associated with perception of mitigating value by the jury, confirming and expanding on the Barnett et al. (2004) study that found higher recommendations of death in the absence of mitigating evidence (Tetterton & Brodsky, 2007). This has since been clarified by more recent research, which found that the higher rates of jury agreement with mitigating evidence

are significantly related to more life sentences in at least one death penalty state (Keesler et al., 2010). That finding suggests that past juries overwhelmed with attenuated or "longshot" mitigating factors were actually less likely to recommend a life sentence.

Although this discussion of the extant literature is not exhaustive, it incorporates the most noteworthy studies and illustrates some of the generalizations and limitations mentioned earlier. The majority of the studies are controlled experiments rather than archival analyses of real capital case data. Perhaps as a function of that, studies typically focus either on broad concepts (e.g., death-qualification) or on a select few sources of mitigation (e.g., abuse, drugs, mental illness), while the number of studies addressing broad-spectrum mitigation is more modest.

Archival research literature.

By far the smallest body of literature on mitigating factors or capital sentencing, archival research is different from experimental research because its analyses are based on historical case data rather than controlled studies. Different investigative approaches come with their respective advantages and disadvantages. Though archival research makes it impossible to infer causality due to lack of experimental control, researchers can argue that its findings are more reliable and generalizeable.

Only one publicly available archival analysis is related to the current proposed project. Beck and Shumsky (1997) examined data from 606 capital cases in Georgia beginning in the 1970s. By comparing the details of each case to the jury's recommendation of life or death, they found that a recommendation of death was significantly more likely than life in two scenarios: with court-appointed counsel, controlling for the defendant's character and circumstances of the crime; and when the

victim was Caucasian, of high social status, or a stranger to the defendant (Beck & Shumsky, 1997).

Proscriptive literature.

By combining the Supreme Court case law with social science literature on capital sentencing, proscriptive literature on the death penalty makes observations and recommendations for the future. Contributed to by legal scholars, social scientists, and a cross-discipline of practitioners, this growing body of literature makes suggestions to practitioners and law-makers alike about the future of the death penalty in America. While some might argue that such an exercise is purely academic, the continually increasing involvement of academics and experts in courtrooms and legislative floors suggests otherwise.

Both the American Psychological Association and American Psychiatric Association have published ethical standards to which their respective members must adhere (American Psychological Association, 2002; American Psychiatric Association, 2009). Additionally, both the Committee on Ethical Guidelines for Forensic Psychologists (1991) (from Division 41 of the American Psychological Association) and the American Academy of Psychiatry and the Law (1995) have published ethical guidelines specifically targeted at those working in a forensic context. Nonetheless, ethical guidelines provide the floor for acceptable conduct, and do little to illuminate what best practices are or ought to be, or if there is any legally enforceable standard of care (see Heilbrun et al., 2008, for a discussion of the differences, both ethical and legal, among standards of practice, standards of care, and best practices).

In 2003, Marczyk et al. provided a model referral, report, and consideration of potential mitigators that practitioners can follow in their process of investigating, collecting, and presenting mitigating evidence in capital cases. In 2008, Marczyk et al. supplemented and updated this to provide practitioners with a principles-based approach to conducting capital case mitigation evaluations. Most recently, the Best Practices in Forensic Mental Health Assessment series by Oxford University Press has released guidelines for conducting capital sentencing, combining a succinct legal and scientific overview with specific practitioner guidelines, spanning from preparation for the evaluation to testimony (Cunningham, 2010).

Social scientists cannot personally affect change via a court ruling or legislative action, but they can be agents of that change with the work they do, the research they publish, and the way they conduct themselves in capital cases. Although principles-based approaches and best-practice standards are aspirational and likely fall above the standard of care (Heilbrun et al., 2008), the American Psychological Association and American Psychiatric Association, in concert with state licensing boards, can always raise the bar on minimally accepted standards in the future. Studies like the one being proposed herein that contribute to the extant literature on the topic are helpful to inform practitioners and policymakers alike, and make recommendations directly or indirectly as to the prudence of current practice.

Rationale for the Present Study

The present study sought to address some of the many questions left unanswered by the relevant research and controlled studies on the subject of mitigation in capital sentencing. Although the extant literature provides some insight into the efficacy of a

few particular mitigating factors, and shows general trends among juries in response to mitigating evidence, there is still an absence of large-scale archival studies.

The database that this thesis analyzed consists of 369 North Carolina capital cases spanning over a decade. The goals of this ongoing project, of which this thesis comprises only one piece, are to isolate particularly potent mitigating factors (potent in the sense that they lead juries to recommend life rather than death), identify particularly effective constellations of mitigating factors, find trends or patterns in the specific mitigating factors that are presented to North Carolina juries, examine the quantities of factors presented and any interaction between quantity and quality or accuracy of those factors, and examine if the efficacy of mitigating factors presented to the jury interacts with or is affected by characteristics of the defendant or the crime.

The major analysis undertaken herein examined a peculiar trend described by the database's architect. Specifically, despite the fact that a variety of mitigating factors provided to juries are presented by defense counsel as settled fact, it is not uncommon for juries to disagree with even those factors. Dr. Laughon explained that she was always surprised when juries disagreed with or failed to find such mitigators, and she wondered whether such treatment was a proxy for a death sentence. Fortunately for this analysis, it was possible to examine *each* juries' treatment of *each* mitigator with which they were presented; when North Carolina juries return sentencing recommendations to the judge, they document which mitigating factors they found/agreed with, which they did not, and their recommended sentence of life or death (on the forms, *see supra*).

The aforementioned observation begs the question why some juries do this. Haney and Lynch (1994) might speculate that these juries misunderstood the instructions

given to them. More cynically, Butler and Moran (2007) might say that these death-qualified juries are pro-prosecution, paying little attention to the mitigating evidence and what they are supposed to do with it. The former explanation would be supported by findings of no relationship between disagreement and sentence recommendation, while the latter would be supported by findings that disagreement more often occurs with death sentences. This database offered the opportunity to empirically investigate this trend before arriving at any tentative conclusion.

The practical implications of answering this question would be layered: First, if a significant relationship appeared between disagreeing with factually asserted mitigators and sentence recommendation, then one could rationalize that the trend is not strictly due to jury misinterpretation of instructions. Second, if disagreement with those mitigators was found to be associated with death sentences, then a variety of somewhat distressing conclusions could be drawn about the way capital juries are weighing mitigating evidence – namely that in some cases they may not be weighing mitigating evidence at all. That fascinating but troubling finding would segue perfectly into a future planned analysis for this ongoing project, examining whether a "magic formula" of aggravation exists that, regardless of mitigating factors, will produce a recommended death sentence. Also, there would be practical implications for practicing defense counsel; namely that while past analysis has suggested a danger of overbreadth, a similar danger may be posed by overdepth (if done at the expense of scope).

Hypotheses

Based on a synthesis of the extant literature, theory, and anecdotal evidence, the hypotheses for the present analysis were four-fold:

(1) Instances wherein juries disagree with objective mitigating evidence are comparably common to instances wherein they disagree.

(2) Jury disagreement with factually asserted mitigating factors is significantly related to a recommended death sentence.

(3) As disagreement increases across multiple factual mitigating factors, so too does the effect size of the relationship between disagreement and death sentence.

(4) The aforementioned relationship will hold when additional demographic variables are added to the analysis.

Method

The Database

The database under examination consisted of 369 capital cases from North Carolina. The cases span from 1982 to 1998, and the collection was created by coding every capital case in print at the Wake Forest University Law Library during that time-frame. Due to that comprehensive coding practice, it is expected that the database includes representative defendants from a variety of occupations, religions, ethnicities, ages, and socioeconomic backgrounds.

Data Collection

The 369-case database was collected by Dr. Pamela Laughon and a variety of her students over a number of years. Dr. Laughon, a North Carolina-based psychologist who specializes in mitigation consultation, began the data collection as an exploration of how mitigation profiles looked across North Carolina capital cases. All of the data were pulled from publicly accessible documents in the Wake Forest University Law Library.

Though the moratorium on the death penalty was lifted by the Supreme Court 1976, she began with 1982 cases because no earlier were available at the library.

By pulling one hard-copy case off of the shelves at a time, Dr. Laughon and her research assistants gradually expanded the database to its current size. Pertinent documents (e.g., jury sentencing forms) were photocopied and retained for Dr. Laughon's personal records. Collectively, she and her students worked their way forward from 1982 cases, continuing to examine every North Carolina capital case in hard copy format at the Wake Forest University Law Library. As they went, Dr. Laughon also coded variables of interest electronically into Microsoft Access.

Today, in its current state of completion, the database contains a wide variety of variables. These include demographic data on the defendants (e.g., race, gender, age), numerous variables based on the case-in-chief (e.g., dates of arrest, trial, and verdict; offense characteristics; victim characteristics; whether the defendant was the direct cause of death), and a thorough coding of sentencing phase variables (e.g., number, type, composition, and language of mitigating factors). The main variables of interest for this study were the mitigating factors presented to the jury, the jury's response to each individual factor, and the sentence recommendations. Data necessary for the planned analyses (*see infra)* were drawn from the Microsoft Access Database using its Query® function, then transferred into SPSS for statistical analysis.

Mitigating Factors of Particular Interest

As mentioned earlier, mitigating factors presented to juries can either be statutorily defined or created by capital defense on a case-by-case basis. As one might imagine, factors that appear in the North Carolina statutory framework are generally

more straightforward. Arguably, the first eight factors (all but factor 9: "Any other circumstance.") are also fairly objective. In other words, they are either applicable or not, and in many cases it is hard to imagine that the factor is debatable. Of those 8, though, 3 are of a particularly factual nature, leaving little room for disagreement when applicable. Treatment of these three factors by juries constituted the thrust of this analysis. These three statutorily defined factors are: f(1), "The defendant has no significant history of prior criminal activity"; f(7), "The defendant's age at the time of the murder"; and f(8), "The defendant aided in the apprehension of another capital felon or testified truthfully for the state in another prosecution of a felony" (see also Appendix B: North Carolina Statutorily Enumerated Mitigating Factors).

Results

Demographic and descriptive analysis.

Preliminary analysis of the data looked at basic demographic and descriptive data of the cases. From the 369 cases coded in the Microsoft Access Database, variables drawn using the Query® function and imported to SPSS included: date of arrest, defendant's age at time of the arrest, gender, race, plea, the jury's response to North Carolina Statutorily Defined Mitigating Factors 1, 7, and 8 (if applicable; i.e., if those factors were presented in a given case), and the jury's ultimate sentence recommendation. Those variables constituted the working dataset from which subsequent analyses were run. Preliminary basic descriptive and demographic statistics were run on all 369 cases.

Cases in the dataset ranged from 1982 to 1998. In terms of race/ethnicity, 175 defendants were Black, 174 were White, 12 were Native American, 4 were Hispanic, 3 were multi-racial, and 1 was Asian. During the guilt phase, 342 pled not guilty (27

guilty). Defendant age ranged from 14 to 68 years (*M*=30.50, *SD*=8.50). Breaking the cases down by gender, 356 of the defendants were male (13 female). Lastly, in 223 of the cases, the jury returned a death sentence (146 life sentences). In those 369 cases, mitigating factor f(1) [no significant criminal history] was put forth 202 times, f(7) [age at time of offense] was put forth 166 times, and f(8) [aided prosecution] was put forth 30 times.

Anecdotal pattern versus general trend.

The first analysis examined Hypothesis 1: Instances wherein juries disagree with objective mitigating evidence are comparably common to instances wherein they disagree. As already mentioned, anecdotal evidence suggests that such practice is not uncommon. To establish that the frequency of disagreement with established mitigating factors significantly *differs* from frequency of agreement, one would conduct a traditional significance test. For this analysis, however, and based on Dr. Laughon's description of capital sentencing practice, it was hypothesized that the number of instances wherein juries disagree with these factors would be roughly comparable to instances wherein they agree. Thus the hypothesis tested was that the frequency of those dichotomous approaches is *not significantly different*.

In statistical terms, this was an exercise in accepting the null hypothesis (Frick, 1995). Accepting the null hypothesis is conceptually challenging because, in logical reasoning terms, it feels like a mistaken inferential reversal (i.e., concluding that failure to find a relationship necessarily indicates an absence thereof). However, Frick (1995) explains that upon satisfaction of three criteria, the null hypothesis can be accepted: (1) the null hypothesis should be plausible; (2) results should be consistent with the null

hypothesis; and (3) a "good effort" should have been made to find an effect (p. 137). Regarding the plausibility of the null hypothesis, anecdotal evidence suggests that disagreement with factually asserted mitigation is not uncommon. Results of any analysis have to be evaluated at the appropriate juncture, but some planning could be done regarding the "good effort" to be undertaken – namely, requiring that any measured difference was far from statistical significance (i.e., $p > .20$)

From the working dataset, every instance in which North Carolina Statutory Factors 1, 7, or 8 were submitted to the jury were examined, and the jury's responses to those factors were tabulated. Because statutory factors are more uniformly submitted than other factors by virtue of their already having been drafted, it was correctly anticipated that there would be many instances of these factors submitted to North Carolina juries, and thus the N for this analysis would be sufficiently large. The two tabulations (instances of agreement vs. instances of disagreement) were compared using a Chi-square goodness of fit test.

Analysis suggested that disagreement with counsel's factually asserted mitigators may be even more common than hypothesized; χ^2 (1, N = 396) = 3.273, p = .07. Of the 396 instances where mitigating factors f(1), f(7), and f(8) were observed, 180 instances were found to have mitigating value, whereas 216 were not (see Table 1). Again, the hypothesis was that the latter would sufficiently approach the former so as to produce no significant difference. In actuality, though, instances of disagreement exceeded instances of agreement. Moreover the margin was large enough so as to preclude acceptance of the null hypothesis, as the observed difference failed to surmount the $p > .20$ cutoff. However, whereas the null hypothesis is not supported by these findings, they very nearly

produced a statistically significant difference based on a traditional $p < .05$ benchmark. Though not hypothesized, the analysis nearly suggested that objectively asserted mitigators are significantly more likely to be *rejected* than accepted.

Whether disagreement with factual mitigation relates to sentence recommendation.

While the former analysis was designed to empirically support Dr. Laughon's observation, its practical implications would nonetheless have been limited. Finding that ignoring of factually asserted mitigation bears on sentence recommendation, though, would have practical implications. This second analysis examined Hypothesis 2: Jury disagreement with factually established mitigating factors is significantly related to a recommended death sentence. Stated another way, recommended sentence (life versus death) is related to the jury's response (agreement or disagreement) with factual mitigating factors presented. Simply put, it was expected that juries in disagreement with factually based mitigating factors more often recommend death sentences than life imprisonment.

This hypothesis was tested using Chi-square tests for independence. From the working SPSS dataset, each of the three factors under investigation was independently evaluated. For a given factor, each time it was presented, the jury's reaction (agree or disagree) was counted. Those two totals were then compared to the jury's recommendation of life or death in those cases using a chi-square test for independence. Ultimately in that fashion, three 2 x 2 Chi-square tests for independence (one for each factor) were used to analyze whether agreement with factually asserted mitigation is related to sentence recommendation. Because three significance tests were

run, with a fourth and fifth to follow for the main hypotheses (*see infra*), a Bonferroni Correction was utilized to compensate for the inflated risk of a Type I error. Specifically, rather than setting *p* at the traditional .05 cutoff for significance, *p* was set at .01 ($\beta = \alpha / n = .05 / 5 = .01$). Following significance testing, Phi coefficients were also calculated for each of the three tests. The Phi coefficients are measures of effect size designed to help illuminate the comparative practical significance of jury reaction to each standalone factor.

Agreement with f(1) [no significant criminal history]

Analysis indicates that agreement with statutory mitigating factor f(1) [no significant criminal history] was significantly related to sentence, $\chi^2 = 19.522$, $p < .001$, $\Phi = .311$ [medium effect size (Cohen, 1988)]. Of the 202 observed cases where defense counsel asserted that the defendant lacked a significant criminal history, 69 juries agreed and recommended a sentence of life, 53 agreed but recommended a sentence of death, 20 disagreed but recommended life, and 60 disagreed and recommended death (see Table 2). This suggests that, as hypothesized, jury agreement with the factual assertion that the defendant lacks a criminal history was significantly related to their ultimate sentence recommendation; agreement was significantly more likely to accompany a recommended life sentences, and disagreement was significantly more likely to accompany a recommended death sentence.

Agreement with f(7) [age at time of the offense]

Analysis indicates that jury agreement with statutory mitigator f(7) [age at the time of the offense] was significantly related to ultimate sentence recommendation, $\chi^2 = 12.103$, $p < .001$, $\Phi = .270$ [small effect size (Cohen, 1988)]. Of the 166 cases where

defense counsel asserted the objective mitigator of the defendant's age at the time of the offense, 25 juries agreed and recommended life, 11 agreed but recommended death, 48 disagreed but still recommended life, and 82 disagreed and recommended death (see Table 3). These findings support the hypothesis that jury agreement with the objectively asserted mitigator f(7) was significantly related to ultimate sentence recommendation, with agreement significantly associated with life sentences, and disagreement significantly associated with death sentences.

One obvious issue with including age as a factually asserted mitigator is the absence of any defined cutoff. The above analysis examining all instances of f(7) agreement and disagreement inherently presupposes that the factor was used appropriately (i.e., when the defendant was young or old). Challenging that supposition with closer examination could reveal that the effect of f(7) agreement is stronger than suggested above when appropriately advocated. The decision on where to set the cutoff, though, is without any clear guidance.

The two traditional benchmarks for the transition from youth to adulthood in the United States are probably at ages 18 (e.g., voting right, eligibility for military service, ability to buy tobacco, pornography, and gamble in certain jurisdictions) or 21 (full rights of adults, i.e. alcohol purchase and consumption). The age of 25 years also carries certain legal rights (e.g., reduction in insurance premiums, ablility to rent a car or home in certain jurisdictions), but many individuals would likely consider an individual to be a full-fledged adult before age 25. The commonality amongst those milestones is that each incorporates important decision making - an ability adults are thought to possess while juveniles and adolescents are not. Nonetheless, the age of full-fledged "adult decision

making" remains somewhat elusive. Looking to the literature, neuropsychological testing and research conducted in the last decade suggests that the prefrontal cortex, utilized in mature decision making (Braver & Barch, 2002; Goldman-Rakic & Leung, 2002; Krawczyk, 2002), may continue development into young adulthood (Hooper et al., 2004; Mukherjee et al., 2002; Paus et al., 2001; Sowell, Thompson, Tessner, & Toga, 2001). The advent and utilization of functional neuroimaging has lent further support to these findings (Bunge, Dudovic, Thomason,Vaidya, & Gabrieli, 2002; Casey, Giedd, & Thomas, 2000; Kwon, Reiss, & Menon, 2002) . That said, the transition from youth to adulthood, whenever that may be, does not necessarily coincide with the time at which age is no longer a viable mitigating factor. In light of this uncertainty, observed frequencies in the dataset were examined for what might appear to be any natural breaks in jury treatment of age as a mitigating factor (see Table 4).

From the dataset, it was possible to calculate each defendant's age at the time of arrest based on the recorded arrest date and the defendant's date of birth. Whereas using age at the time of offense would have been ideal, that information was not available for all cases - thus age at time of arrest was used as a proxy. Examination of agreement with factor f(7) broken down by the age of the defendant at the time of arrest reveals two natural breaks: 27 years and 19 years. In the case of the former, a convicted defendant who was 27 years old at the time of arrest was the oldest whose jury concluded his age was of mitigating value. In the case of the latter, it was only in cases of 19-year-old defendants and younger that juries more often than not agreed that age was of mitigating value. Two analyses mirroring that which looked at all instances of f(7) were conducted, one examining only cases of f(7) with defendants aged 27 or younger and one examining

only cases with defendants aged 19 and younger. The hope was that these could help further illuminate the main analyses undertaken and the relationship between agreement with f(7) and sentence recommendation.

When limiting the analysis to these more applicable cases in which the defendant was aged 27 or younger, analysis indicates that jury agreement with mitigator f(7) was significantly related to ultimate sentence recommendation, $\chi^2 = 10.844$, $p = .001$, $\Phi = .281$ [small effect size (Cohen, 1988)]. Of the 137 cases where defense counsel more applicably asserted the objective mitigator of the defendant's age, 25 juries agreed and recommended life, 10 agreed but recommended death, 40 disagreed but still recommended life, and 62 disagreed and recommended death. These findings similarly support the hypothesis that jury agreement with objectively asserted mitigator f(7) was significantly related to ultimate sentence recommendation. When limiting the analysis to "applicable" cases (i.e., aged 27 or younger by arrest), a slightly larger effect size was observed ($\Phi = .281$ versus $\Phi = .270$) than when including all instances of f(7) presentation.

When limiting the analysis still further to perhaps the "most applicable" cases, or those in which the defendant was 19 or younger at the time of arrest, analysis failed to find a significant relationship between agreement with f(7) and sentence recommendation, $\chi^2 = 2.274$, $p = .132$, $\Phi = .285$. Of the 28 defendants age 19 or under at the time of arrest whose attorneys asserted f(7), 14 juries agreed and recommended life, 5 agreed but recommended death, 4 disagreed but still recommended life, and 5 disagreed and recommended death (see Table 6). This analysis may have failed to find significance due to the reduced number of observed cases. Specifically, whereas a stark contrast was

observed between recommended life and death sentences in cases of agreement with f(7) (14 versus 5), no such contrast was present in cases of disagreement (4 versus 5). With more observed cases, that contrast may have emerged. On the other hand, a more parsimonious explanation would simply recognize that, where juries agreed that the defendant's youth was of mitigating value, they were more likely to recommend life; where juries disagreed that youth mitigated, that conclusion was simply not predictive of sentence recommendation. Thus the takeaway conclusion may be that dichotomous treatment of f(7) as a factually asserted mitigator may not relate to sentence recommendation, but jury agreement with the mitigating value of youth may. Nonetheless, despite a failure to find significance, the effect size was again slightly larger when limiting the cases to an arguably more applicable age range (Age 19 $\Phi = .285$ > Age 27 $\Phi = .281$ > All Cases $\Phi = .270$). Thus, in light of these three comparative analysis examining the relationship between f(7) agreement and sentence recommendation, one may tentatively conclude that agreement was significantly associated with life sentences, and the likelihood of a jury agreeing increased linearly as the defendant's age decreased – as too did the practical effect of that agreement or its bearing on the sentencing recommendation.

Agreement with f(8) [aided prosecution]

Analysis indicated that jury agreement with statutory mitigator f(8) [aided prosecution] was not significantly related to sentence, $\chi^2 = .151$, $p = .515$, $\Phi = .071$ [small effect size (Cohen, 1988)]. Of the 30 cases where defense counsel asserted the objective mitigator that the defendant aided the prosecution, 8 juries agreed and recommended life, 15 agreed but recommended death, 3 disagreed but recommended life, and 4 disagreed

and recommended death (see Table 7). This analysis may again have been underpowered due to the scarcity of f(8) instances in the dataset, or in capital litigation for that matter. However, unlike with the previous analysis examining age, herein the frequency counts did not align with the expected pattern (i.e., highest frequencies in the Agreement-Life and Disagreement-Death conditions). Rather, regardless of agreement or disagreement, death was more often recommended in both situations. Thus, a more likely explanation may be that agreement with f(8) [aided prosecution] was simply not related to a life sentence. An intuitive explanation could be that juries interpret f(8) as confirmatory evidence of guilt; if the defendant has assistance to offer the prosecution, then he must really have committed the offense. Past research has shown that residual doubt of guilt has mitigating value (Garvey, 1998). If juries treat f(8) as confirmatory evidence of guilt, that would preclude the existence of residual doubt as a mitigating factor, thus even a larger N would likely fail to produce significant findings relating to the hypothesis.

Whether Increasing Disagreement is Associated with Increased Death Sentences.

A follow-up analysis examined whether the effect of the anticipated trend increased as a function of similar treatment among all three of the factually asserted mitigators. To restate Hypothesis 3: As disagreement increases across multiple factual mitigating factors, so too does the effect size of the relationship between disagreement and death sentence. Thus this analysis examined only cases where the jury was presented all three of the statutory mitigating factors of interest – f(1), f(7), and f(8).

Though it was known that the number of eligible cases for the third hypothesis would be much lower, familiarity with the dataset suggested a sufficient number of cases among the 369 with juries who received all three of the factors under investigation. It

was hypothesized that, for those juries, their comparative treatment of the three mitigators was significantly related to their sentence recommendation. Whereas the previous analyses examined the trend factor-by-factor, this analysis examined the trend in omnibus fashion for cases in which all three factors were presented to the jury. A linear relationship was hypothesized whereby juries that disagreed with all three factors would most likely recommend a death sentence, juries that agreed with all the mitigators would most often recommend a life sentence, and juries findings some but not all of the mitigators would fall in the middle.

The hypothesis was tested using a 2 x 4 Chi-square test for independence, comparing sentence (life or death) to the fraction of the three factors agreed with (none, 1 of 3, 2 of 3, or 3 of 3). Analysis indicated, however, that increasing disagreement across factually asserted mitigators was not significantly related to sentence recommendation, $\chi^2 = 5.943$, p=.051, Cramer's V =.606 (see Table 8). The N for this analysis was smaller than hoped-for going into the analysis; whereas hundreds of juries were presented with mitigators f(1) and/or f(7), only 30 were presented with f(8). Thus, following the prior single-factor analysis of f(8), it became self-evident that this analysis would have an N of 30 cases at most, but likely less.

Unlike with the standalone analysis of f(8), though, it seems possible that this hypothesis would have been supported by significant findings had there been more cases where all three factors were asserted. Though the analysis undertaken here did not closely approach significance, it would have *but for* the decision to use a Bonferroni Correction. Moreover, though, while recommended death sentences did not seem to

align with decreasing agreement, recommended life sentences increased linearly as percent agreement with the factors increased.

Two observations are worth noting in light of this analysis. First, the analysis incorporated fewer cases than hoped for, with guidelines suggesting an anticipated frequency of at least 5 cases for each cell of a Chi Square analysis (Tabachnick & Fidell, 2007). Second, the findings nonetheless approached the traditional benchmark for significance. Taken together, these two observations inspired an ad-hoc question for analysis: If the inclusion of f(8) in the combined analysis of the factors was preventing findings of statistical significance, would removal of f(8) produce statistically significant findings aligned with the original hypothesis? Stated another way, would agreement with both f(1) and f(7) be found significantly related to life sentences, and with an effect size greater than that of either factor standalone? Such a finding could suggest that capital defendants who are both young at the time of the offense and lack a significant criminal history were more likely to receive life sentences when those factors were appropriately asserted.

This ad-hoc hypothesis was tested using a 2 x 3 Chi-square test for independence, comparing sentence (life or death) to the fraction of the two factors agreed with (none, 1 of 2, or 2 of 2). As newly hypothesized, analyses indicated that increasing disagreement across factually asserted mitigators was significantly related to sentence recommendation, $\chi^2 = 18.634$, $p < .001$, Cramer's V =.432 (see Table 9). Though a linear relationship would have been more closely aligned with the hypothesis (i.e. increase in observations along categorical increments), the most striking observation may be that, out of the 100 cases where both f(1) and f(7) were presented, *only a single jury agreed with both factors*

but still sentenced the convicted to death. Out of curiosity, that case was further examined, and it may be further instructive to mention that the case was unusual. Namely, the jury in that case found 17 of the 18 mitigating factors presented, but still sentenced the defendant to death – a highly surprising outcome in light of prior research. This begs the question whether that single observed case is something of an outlier, which would further strengthen the remarkable observation produced by this ad-hoc analysis. While the relationship may not be as clean or linear as hypothesized, a major implication of this ad-hoc analysis is that juries may be reluctant to sentence a comparatively young defendant with minor criminal history to death.

Whether the Trend is Real (Regarding the Planned Regression)

Significant findings in the previous analyses suggest that jury reaction to factual mitigation is related to ultimate sentence recommendation. However, those analyses are limited in their ability to address whether the observed trend could be better explained by other variables. A final planned analysis adds additional case variables in an attempt to flush out whether such confounds do exist, addressing Hypothesis 4: The aforementioned relationship will hold when additional demographic variables are added to the analysis.

The analytic plan called for use of multivariate regression - supplementing the three factual mitigating factors with demographic variables historically associated with sentence recommendation. Due to the low number of cases where all three mitigating factors of interest were presented, though, that multivariate regression would have been underpowered. However, in light of the ad-hoc analysis examining the combined treatment of f(1) and f(7), and noting that 100 cases are available where both factors were presented, a logistic regression utilizing f(1) and f(7), but not f(8), would be appropriate.

Keeping in mind guidelines recommending at least 15-20 cases for each independent variable, regressing f(1), f(7), gender, race, and plea on sentence recommendation should be sufficiently powered (Tabachnick & Fidell, 2007).

The results of the regression indicated that the five predictors explained 48.6% of the variance ($R^2 = .236$, $F(5,98) = 5.80$, $p < .001$, see Table 10). It was found that agreement with f(1) [no significant criminal history] significantly predicted sentence, ($\beta = .311$, $p = .002$), with f(7) [age] agreement, ($\beta = .287$, $p = .013$), and plea ($\beta = .509$, p= .017) approaching the $p < .01$ cutoff for significance. More clearly non-significant predictors included gender ($\beta = .105$, $p = .698$), and race ($\beta = .275$, $p = .275$). While it can be dangerous to draw conclusions from a failure to find statistical significance, a few observations are worth making. First, agreement with f(7) [age] and plea would both have been found significant predictors but for the decision to use a Bonferonni Correction. Particularly compelling regarding plea, statistical significance was approximated despite only 5 of the 100 defendants having pled guilty. This suggests that plea may bear heavily on sentence recommendation (in all five of those cases the defendant was sentenced to death). Upon closer examination of those five cases, no pattern was immediately obvious. The modest commonality among them might be that four shared the aggravating factor that the murder was committed for pecuniary gain, and three shared the aggravator that the murder was especially heinous, atrocious, or cruel - that did not, however, make them unique among other cases in the dataset.

A second observation worth noting is that the likely reason for non-significant findings regarding race and gender are very different. With gender, as one might expect, the failure to find significance may be attributable to the scarcity of females in the 100

cases analyzed (97 male, 3 female). On the other hand, race was not found to be a significant predictor despite racial diversity in the 100 cases (55 African American, 39 White, 4 Native American, 1 Other/Multi Racial, 1 Asian). However, this is consistent with prior research, suggesting that it is not the defendant's standalone race that significantly predicts guilt and sentence, but rather an interaction of the defendant's and victim's races.

Discussion

Summary of Findings

This study examined the generalizeability of Dr. Laughon's anecdotal observation that juries commonly fail to find arguably objective mitigating factors; rather, juries are almost equally likely to find, or fail to find, the presence of those factors and that they have mitigating value. Further examination explored whether a significant relationship existed between treatment of those objective mitigators, taken individually or combined, and a recommendation of life or death sentence. Statistical analysis of 369 North Carolina capital cases suggests that, in actuality, Dr. Laughon's observed trend may be even more common than anticipated. Moreover, in addition to not being able to accept the null hypothesis anticipating no significant difference between acceptance or rejection of factually asserted mitigators, the observed frequency of juries in disagreement with those mitigators outnumbered those in agreement 216 to 180 - an even greater level of disagreement than expected. That said, some significant relationships were found to exist between agreement with some of the objectively asserted mitigators and sentence recommendation. Specifically, jury agreement with NC Statutory Mitigators f(1) [no significant criminal history] and f(7) [age at the offense] were both found to be

significantly related to life sentences. Further investigation also revealed that the effect size of agreement with age on sentence recommendation increased linearly as the defendant's age decreased. Lastly, the strongest predictor of a life sentence was found in cases where both f(1) and f(7) were presented, and the jury agreed that each had mitigating value - suggesting that a young defendant with relatively minor criminal history may fare better than others in capital sentencing proceedings.

Implications

Results suggested that objectively asserted mitigators may not be comparably found and dismissed. At first glance these findings may seem unrewarding, but one interesting pattern worth note is that instances of disagreement with those factually asserted mitigators actually outnumbered agreement by nearly enough to produce a statistically significant difference. Although failing to reach statistical significance, this trend is contrary to the unstated alternate hypothesis (i.e., that juries are significantly more likely to agree with objective or factually asserted mitigating factors). Whereas the generalizeability of this pattern may be limited, it should be highlighted that with the cases investigated herein, defense counsel could not even persuade juries to agree with their factually asserted mitigation more than *half* of the time.

Finding a significant relationship between agreement with factual mitigator f(1) [no significant criminal history] and ultimate sentence recommendation has a number of implications worth highlighting. First and most basically, where the defendant lacks a significant criminal history, defense should be certain to advocate this – when applicable and agreed with, that factor was associated with more life sentences than death. Second, the converse is also important to note; if the jury may conclude that the defendant’s

criminal history is, in fact, significant, then counsel may be cautioned against advocating the mitigator – disagreement with f(1) was three times more often associated with a death sentence than with life. Though no causal inference is supported by the analyses undertaken herein, intuition supports the idea that juries may punish an overly cavalier defense attorney by returning a death sentence. This also suggests, though somewhat indirectly, that impression of criminal history or propensity for criminality weighs strongly with juries in sentencing decisions.

Further analyses suggested that, as indicated by the literature, age is a significant mitigating factor in capital sentencing (Garvey, 1998). More interesting, though, are the two-part findings that, as age decreased, it appeared that (1) juries were more likely to agree with the mitigating factor, and (2) greater weight was afforded to the identified mitigator. These findings have obvious practical implications for practicing capital defense attorneys and mitigation specialists; namely that they should be certain to advance the defendant's youth, especially when applicable. Additionally, through a more thorough breakdown of f(7) [age at time of offense] treatment, using age at arrest as a proxy, it came to light that in the 100 cases where juries were presented with f(7), they more often agreed than disagreed when the defendant was 19 or younger, more often disagreed than agreed when the defendant was 19 to 27, and never agreed when the defendant was over 27. This suggests that capital defense may be advised to proceed carefully when advancing f(7) as a mitigator in cases of 19 to 27-year-olds, and may need to expend extra time or resources establishing why that given age should be mitigating. However, neuropsychological research conducted in the last decade (all since the most contemporary case in the database) indicates that development of the prefrontal cortex

and mature decision making may continue into young adulthood (Hooper et al., 2004). A well-versed expert or mitigation specialist today could communicate such information to a jury, thus these observed patterns regarding jury receptivity to age as a mitigator might be interpreted as a conservative estimate if applied today. Though not statistically significant, implications nonetheless flow from findings suggesting that juries were more likely to proscribe death regardless of whether they agreed that "the defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony" (N.C.G.S.A. § 15A-2000(f)(7) (2010)). One possible explanation is that juries interpreted this as an admission of guilt. Perhaps it was interpreted in such a way as to lead to the conclusion that if the defendant was able to aid the prosecution he must have had some kind of guilty knowledge. In light of Garvey's (1998) findings that residual doubt of guilt effectively mitigates, these findings could suggest that the converse may also be true; confirmatory evidence of absolute guilt may aggravate.

Although the original planned analysis for increasing agreement among factually asserted mitigators may have been underpowered, some implications can be drawn from the analysis of the combined treatment of factors f(1) and f(7). The effect size (Cramer's V = .432) for the combined treatment of the two factors was larger than either f(1), (Φ = .311), or f(7), (Φ = .270), standalone. This supports the hypothesized additive effect of agreeing with more factually asserted mitigation. These results suggest that as juries agreed with increasing amounts of factually asserted mitigators, there was an increased likelihood of recommending a life sentence rather than death. Moreover, as indicated earlier, it may be of particular interest to point out that there was only one observed case

where juries agreed that the defendant lacked a significant criminal history (f(1)) and that he was young at the time of the offense (f(7)) but still recommended death. The obvious practical implication here is that defense counsel would be well advised to advocate these facets of the defendant when applicable, as jury agreement with both factors could weigh heavily toward a life sentence.

The multivariate regression indicated that f(1) remained a significant predictor of sentence recommendation even with other case variables added to the equation. Additionally, f(7) would also have remained a significant predictor, and approached significance, but for the employ of a Bonferroni Correction. That plea emerged as a significant predictor, despite its comparative scarcity in the dataset, also brings with it practical implications. The utility of the regression lies in the practical implication that minor criminal history, age, and plea will likely hold as predictors of sentence recommendation even with great case-to-case variation. Two main teaching points derive from this finding. First, again, defense counsel should highlight a defendant's youth and comparatively minor criminal history when applicable. Second, at least in these cases, defendants did not seem to get any lenience from the jury for pleading guilty. Although perhaps counterintuitive, this is not wholly in conflict with prior research showing that residual doubt of guilt is a significant mitigator. A guilty plea may, like the presence of f(8) [aided prosecution], be interpreted as precluding such residual doubt of guilt, removing the potential value of that mitigator.

Limitations

The first major limitation is the difficulty of empirically assessing "factual" mitigators, and separating those from "opinion" mitigating factors. The impetus for the

analyses undertaken herein was Dr. Laughon's reported consternation over juries disagreeing with or failing to find mitigating factors that, in her mind, she and defense counsel had established beyond any doubt. However, it is difficult, if not impossible, to distinguish from the jury sentencing forms whether the jury: (1) disagreed with the asserted mitigator; (2) did not believe that the mitigator was present; or (3) felt that the mitigating factor, while true and present, lacked mitigating value. The forms simply reveal either a "yes" or "no" for each factor, so some inductive reasoning was required to get from that point to an empirical analysis of factual mitigators. In the end, as explained earlier, the closest approximation became to pick out the most factually based mitigators and presume that they were used when applicable. Admittedly, though, these are two leaps of faith. Throughout this text, attempts were made to pay careful attention to presenting the discussion in light of factual assertions or arguments, as there are obviously no absolutes. However, this limitation, though significant, is not deleterious for the practical significance of the study's results. Regardless of whether a mitigating factor is a fact, an asserted fact, an argued fact, or a fact as opined by defense counsel or a mitigation specialist, the significant association of age at the time of the offense and/or minor criminal history with sentence recommendation can be instructive for future practitioners.

A second limitation is somewhat related, but speaks directly to assessing the appropriateness of presenting the jury with factor f(1) [no significant criminal history]. Although this was identified as one of the more factually natured of the statutory mitigating factors, the use of the word "significant" introduces the possibility of case-to-case variation. In an ideal world, the criminal files for all of the defendants in all of the

cases would have been complete and available, and from this some kind of benchmark or standard could have been designed to separate the applicable from the extenuated presentations of f(1). Unfortunately, though, such an undertaking was not possible given the available database. Thus, again, in discussing the utilization and presentation of this factor, attention was paid to couch the act as "asserting" or "arguing" to keep this room for error in mind. Nonetheless, despite potential variation among cases, the relationship of f(1) agreement and life sentences was found to be statistically significant. Because significance was found despite the potential inclusion of attenuated cases of f(1), one could imagine that limiting the analysis to more strictly applicable cases would produce findings of greater statistical significance, with potentially an even greater effect size.

Direction of Future Research

A variety of future planned analyses are already slated for the database on which this project relied. However, some of those analyses may need to be reconsidered or further clarified in light of the analyses undertaken herein. Also, previously unconsidered analyses now seem obvious areas of curiosity and worth examination.

Through the undertaking of this project, issues of case-to-case consistency and the way that may limit sample size and statistical power came to light. Though it does not seem surprising in hindsight, it was unanticipated at the time how quickly the number of cases would diminish as additional mitigating factors were added to the analytic plan. Specifically, though analyses were sufficiently powered for cases where f(1), f(7), or f(8) were presented standalone, by the time the dataset had been cut to only cases that included all three, even comparatively basic statistical analysis became somewhat compromised. One of the ultimate analyses planned for this dataset is to conduct a

logistic regression, regressing 15 or so mitigating factors on sentence and seeing which ones carry the most weight (maximum 15-20 for sufficient power based on 369-case database). Originally, the plan was to utilize the 15 or so factors perceived to have the greatest weight based on empirical research or anecdotal evidence. Now, however, it may be necessary to select factors for inclusion based on their comparative prevalence. This approach will hopefully maximize the number of mitigators that can be regressed together while still ensuring that the analysis is sufficiently powered.

An additional item for future research, whether inspired or further motivated by the present study, is to examine the effects of age at trial on the treatment of agreement with age at offense. Though one can assume that jurors are told that the defendant's age at the time of the offense (sometimes a difference of years in long cases or protracted investigations), it would be interesting to see if there is increasing disparity in agreement with age as a mitigating factor in cases where the defendant seated before the jury is older. This curiosity stems from the observations noted above (see Table 4) and the disparity of agreement versus disagreement with f(7) [age] in cases of defendants who were in their early 20s at the time of arrest. Had those defendants aged greatly between offense and trial, or do juries feel that early-to-mid 20s is an age where moral culpability can vary among individuals? And would updating the database, in light of new neuropsychological research on continued prefrontal cortex development, change the observed cutoffs? Additional curiosity surrounding age stems from wide range of defendant's whose mitigation profiles included age as a mitigator (17-68 years). Moreover, the uniform disagreement with f(7) [age] in all cases where the defendant was 27 or older at arrest begs an investigation of defense strategy. It seems intuitive that age

could be a mitigator for the comparatively young or the comparatively old, but for someone aged 25-60 at the time of the offense? How is age a mitigating factor for a defendant aged 35 (twice put forth) or one aged 48 (twice put forth)? Though this may be an academic exercise that reveals uninformed or ineffective counsel, it would be interesting to see if there is something more under the surface.

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Appendix A: North Carolina Statutorily Enumerated Aggravating Factors

North Carolina – N.C.G.S.A. § 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(e) Aggravating Circumstances.--Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the

performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

Appendix B: North Carolina Statutorily Enumerated Mitigating Factors

North Carolina – N.C.G.S.A. § 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(f) Mitigating Circumstances.--Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

Appendix C: Illustrative Tables

Table 1: Whether factually based mitigators are comparably found/dismissed

	Agreement	Disagreement
f(1), f(7), & f(8)	Observed: 180	Observed: 216

Note: χ^2 (1, N = 396) = 3.273, p = .07

Table 2: Agreement with f(1) [no significant criminal history] and sentence

	Agreement	Disagreement
Life	Observed: 69	Observed: 20
Death	Observed: 53	Observed: 60

Note: χ^2 = 19.522, p < .001, Φ = .311

Table 3: Agreement with f(7) [age at time of offense] and sentence

	Agreement	Disagreement
Life	Observed: 25	Observed: 48
Death	Observed: 11	Observed: 82

Note: χ^2 = 12.103, p < .001, Φ = .270

Table 4: Agreement with factor f(7) by age of defendant at time of arrest

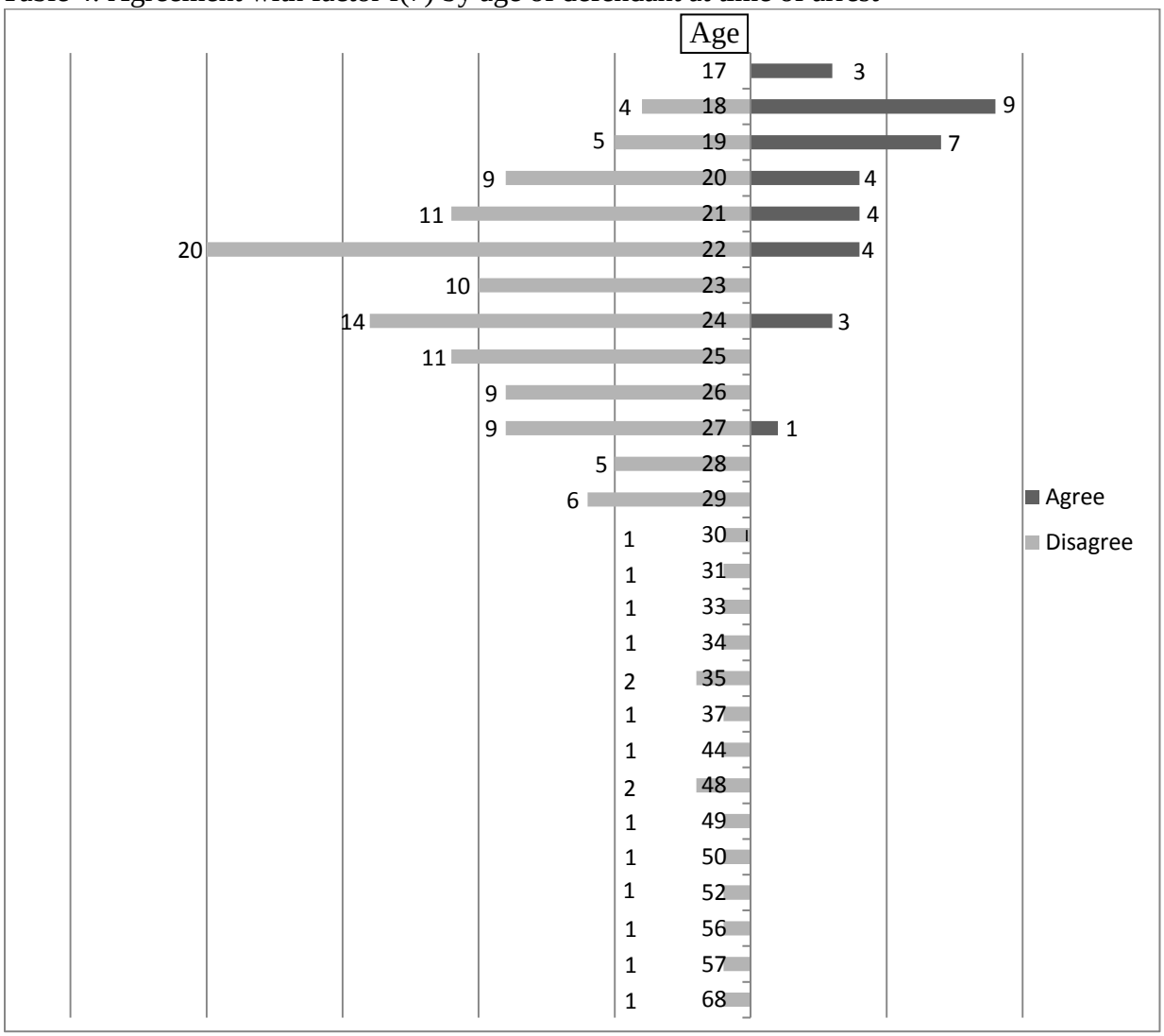

Table 5: Agreement with f(7) [age at time of offense] and sentence, defendants aged 27 or younger at arrest

	Agreement	Disagreement
Life	Observed: 25	Observed: 40
Death	Observed: 10	Observed: 62

Note: $\chi^2 = 10.844$, $p = .001$, $\Phi = .281$

Table 6: Agreement with f(7) [age at time of offense] and sentence, defendants aged 19 or younger at arrest

	Agreement	Disagreement
Life	Observed: 14	Observed: 4
Death	Observed: 5	Observed: 5

Note: $\chi^2 = 2.274$, $p = .132$, $\Phi = .285$

Table 7: Agreement with f(8) [aided prosecution]and sentence

	Agreement	Disagreement
Life	Observed: 8	Observed: 3
Death	Observed: 15	Observed: 4

Note: $\chi^2 = .151$, $p = .515$, $\Phi = .071$

Table 8: Whether increasing jury agreement across f(1), f(7), and f(8) is related to sentence

	Agreement with 0 of 3 factors	Agreement with 1 of 3 factors	Agreement with 2 of 3 factors	Agreement with 3 of 3 factors
Life	Observed: 0	Observed: 1	Observed: 3	Observed: 4
Death	Observed: 0	Observed: 4	Observed: 4	Observed: 0

Note: $\chi^2 = 5.943$, $p=.051$, Cramer's V =.606

Table 9: Whether increasing jury agreement across f(1) and f(7) is related to sentence

	Agreement with 0 of 2 factors	Agreement with 1 of 2 factors	Agreement with 2 of 2 factors
Life	Observed: 9	Observed: 27	Observed: 16
Death	Observed: 22	Observed: 25	Observed: 1

Note: $\chi^2 = 18.634$, $p < .001$, Cramer's V =.432

Table 10: Whether f(1) and f(7) remain significant when demographic predictors added

Variable	B	Standard Error	Standardized Error Beta	t	p
(Constant)	-.995	.498		-1.997	.049
f(1)**	.311	.097	.301	3.206	.002
f(7)*	.287	.113	.238	2.546	.013
Gender	.105	.269	.036	.389	.698
Race	.073	.067	.100	1.098	.275
Plea*	.509	.210	.222	2.426	.017

Note: *p < .05, **p<.01